



Board Report

File #: 2022-0025, File Type: Motion / Motion Response

Agenda Number: 26.

REVISED
CONSTRUCTION COMMITTEE
FEBRUARY 17, 2022

SUBJECT: LOCAL SMALL BUSINESS PREFERENCE

ACTION: APPROVE RECOMMENDATION

RECOMMENDATION

CONSIDER:

- A. RECEIVING AND FILING the report back to Motion 31 on a Local Small Business Enterprise (LSBE) Program; and
- B. AUTHORIZING the CEO to implement a three-year Pilot LSBE Preference Program inclusive of Five Point Preference Incentive for negotiated procurements.

DUPONT-WALKER AMENDMENT:

- A. Report back in August 2022 on how Metro can encourage greater than 30% LBSE participation for proposers that do not meet the LSBE criteria as a prime but subcontract to LBSE eligible businesses, either through additional preference credits beyond the five points offered by the pilot or providing further incentives in the procurement process; and
- B. Request Metro to conduct an external audit no later than one year into the pilot to ensure eligible small businesses are meeting the stated eligibility requirement of being headquartered in LA County for at least 6 months.

ISSUE

On October 21, 2021, the Board passed Motion 31 (Directors Hahn, Dupont-Walker, Butts, Mitchell, Dutra, and Kuehl) requesting a report back in February 2022 on a Local Small Business Enterprise Program.

BACKGROUND

As LA County emerges from the COVID-19 pandemic, it is important to support local small businesses to ensure a clear path to economic recovery. Metro has a vested interest in leveraging,

to the greatest extent possible, the millions of dollars we pay to contractors to build, operate, and plan transportation projects for the benefit of LA County small businesses and its residents.

In May 2021, the US Department of Transportation (DOT) authorized a four-year pilot program allowing agencies like Metro to use Federal dollars for local hire, to target these resources for workforce development in the communities where our transportation projects are being built.

To support similar efforts on the contracting side and to promote local small business participation, staff via this motion has been asked to research small business local preference requirements and how they can be integrated into Metro’s contracting program. Doing this involves changes to Metro policies and State and Federal laws and regulations. This report provides a summary of staff’s benchmarking of National local preference programs, as well as Metro specific recommendations.

Implementation of a small business local preference initiative is in addition to Metro’s already implemented Disadvantaged Business Enterprise (DBE), Small Business Enterprise/Disabled Veterans Business Enterprise (SBE/DVBE) programs, the Medium-Size Business Enterprise (MSZ) and Small Business Prime (Set-Aside) programs, the Contracting Outreach and Mentoring Program (COMP) and Certification Initiatives.

DISCUSSION

Staff reviewed the feasibility of establishing a local small business preference program. The program must be race and gender-neutral, in accordance with state law (Proposition 209), which prohibits state governmental institutions from considering race, sex, or ethnicity, specifically in the areas of public employment, public contracting, and public education. In addition, the program must have a rational basis supported by a legitimate government purpose. For Metro, this means strengthening the local economy and maximizing contracting opportunities that increase capacity and growth of local small and historically under-utilized businesses within the communities in which Metro’s transportation projects are being built. The following responses to the Motion support the recommendations for a local small business preference program.

A. Survey local preference best practices nationally and make recommendations for local preference.

To evaluate a recommendation for Local Preference in small business contracting, staff benchmarked the application of Local Small Business Preference programs in contracting by sixteen (16) national, regional, and local transportation, county and city public agencies. In addition to eligibility, staff considered the preference incentives, contract thresholds, and program applicability. Six (6) of the sixteen (16) agencies benchmarked did not have a local preference program (DART, Sound Transit, LAUSD, Santa Clara VTA, CTA, and SBCTA).

The following matrix includes the results of the benchmarking survey:

Agency	Preference / Incentive	Contract Threshold	Applicability (RFP/IFB)
City of Los Angeles	8%	<\$150,000	RFP/IFB

LAWA	10%	≤\$100,000	RFP/IFB
Bay Area Rapid Transit (BART)	7% or 5% (based on funding)	>\$10,000,000	RFP/IFB
SF International Airport	10% (Prime) 5% (SBA-LBE's)	>\$10,000,000	RFP/IFB
County of Los Angeles	15%	>\$5,000	RFP/IFB
SFMTA	10% (Prime) 5% (SBA-LBE's)	>\$10,000,000	RFP/IFB
City and County of San Francisco	10% (Prime) 5% (SBA-LBE's)	>\$10,000,000	RFP/IFB
City of Houston	2.5%	≤\$100,000	RFP/IFB
County of San Bernardino	5%	≤ \$60K	RFP/IFB
City of San Diego	2%	>\$50,000	RFP/IFB

Only two transportation authorities had established a small local business enterprise preference program (BART and SFMTA) along with three airports (LAWA, San Francisco and San Diego Airports). The remaining local preference programs were established by local city and county governments with a wide array of criteria in terms of applicability. The standard preference incentives across all programs reviewed was a bid discount for Invitation to Bid (IFB) or evaluation points for Request for Proposals (RFP). Preference percentages ranged from 2% to 15%, depending on the funding source, dollar value or prime/subcontractor classification. Across all programs, 5% was the most common preference incentive.

Additionally, staff analyzed awards to Metro certified small businesses with zip codes within the City and County of Los Angeles and outside Los Angeles County from 2015 through December 2021. The awarded data reported is based on contracts tracked by Metro DEOD and does not represent Metro’s total spend.

Location	Total # of Contracts Awarded to Certified SBE Firms	Total # of \$'s Awarded to Certified SBE Firms	Total % of \$'s Awarded to Certified SBE Firms (rounded)	Total # of SBE Certified Firms that Received Contract Awards
City of Los Angeles	380	\$124,810,896	13%	147
County of Los Angeles	887	\$403,325,805	42%	378
Outside LA County	1101	\$425,342,375	45%	416
Total	2368	\$953,479,076	100%	941

Based on this data, and Metro’s geographic jurisdiction, it is recommended that the County of Los Angeles represent the boundary of Metro’s local small business preference program.

Certification Benchmarking

Metro staff conducted an analysis of several local and regional agencies to see which have a Local Preference certification program in place. Agencies surveyed included the following: The City of Los Angeles, Los Angeles World Airports (LAWA), The County of Los Angeles, Los Angeles Unified School District, Los Angeles Community College District, Metrolink, Metropolitan Water District, OmniTrans, The County of San Bernardino, and the U.S. Small Business Administration. Of the agencies surveyed, Metro found that the City of Los Angeles together with LAWA and the County of Los Angeles are the only agencies within the County of Los Angeles that have a Local Preference program.

The County of San Bernardino offers a Local Preference Program. In order to qualify, the firm's headquarters is required to be located within the County of San Bernardino and demonstrate they have been open and established for at least six months prior to the issuance of the solicitation. SBCTA and OmniTrans do not have a Local Business Preference Program.

The City of LA/LAWA offers two local preference certifications: Local Business Preference Program (LBE) certification and Local Small Business Enterprise (LSBE) certification. To qualify, firms must have a workspace within LA County and must be in compliance with all applicable laws relating to licensing and is not delinquent on any Los Angeles City or Los Angeles County taxes.

Firms must also be able to demonstrate one of the following:

- a) At least 50 percent of its full-time employees perform work within the boundaries of the County on at least 60 percent of their total hours worked on an annual basis; or
- b) It is headquartered in the County of Los Angeles. Headquartered means that the business physically conducts and manages all of its operations from a location in the County.

The Local Business Preference Program certification through the City of LA/LAWA does not require firms to be Small Business Enterprise (SBE) certified in order to qualify, however, the Local Small Business Enterprise certification offered does. The City of LA/LAWA recognizes and accepts a firm's Metro SBE certification, along with SBE certification from other agencies including DGS' Small Business certification, when applying for their LSBE program.

The County of Los Angeles offers LSBE certification which requires firms to be SBE certified prior to applying for LSBE certification. The business must meet the following criteria:

- Independently owned and operated and not dominant in its field of operation.
- The firms principal place of business is to be in Los Angeles County for at least the last 12 months.
- The owners (officers in the case of a corporation) must live in California and with its affiliates, be either:
 - A business with 100 or fewer employees and average annual gross receipts of \$15 million or less over the last three years.
 - A manufacturer with 100 or fewer employees.

The County of LA recognizes and accepts a firm's Metro SBE certification, along with DGS' Small Business certification, when applying for their LSBE program.

B. Evaluate and recommend changes to Metro policies regarding advancing local

preference in small, medium, and disadvantaged business contracting.

Local Preference Recommendation

Staff recommends a 5-point, three-year Pilot Local Small Business Enterprise (LSBE) Preference program on non-federally funded negotiated procurements equal to or in excess of one-hundred thousand dollars (\$100,000) with SBE/DVBE goals.

Negotiated Procurement

Action Type RFP	Threshold Level	Preference (Maximum)	Preference Type	Applicable to Federally Funded Acquisition	Applicable to Non-Federally Funded (State/Local) Acquisitions
Negotiated procurements for, Supplies, Equipment Materials and Services, including professional services	≥\$100,000	5	Evaluation Points (Bonus Points)	RFP	RFP
				No	Yes

LSBE Preference Application

- SBE Proposers that meet the LSBE criteria as a prime will receive a 5 point preference credit added to their evaluation score; or
- Proposers that do not meet the LSBE criteria as a prime but subcontract at least 30% of the contract value with eligible LSBE firms will receive a 5 point preference credit added to their evaluation score.
- For RFPs, the LSBE preference will be bonus points above the 100-point evaluation criteria scale.
- The maximum LSBE preference cannot exceed 5 evaluation points.

Initially, the three-year Pilot launch of the LSBE preference will only apply to non-federally funded negotiated procurements, within the proposed threshold. Metro must first seek a state law statute amendment to obtain authorization to implement the local preference on Metro competitive low bid procurements. Please see Section C to this report for a summary of activities being undertaken.

LSBE Certification

In order for firms to qualify for Metro’s Local Small Business Enterprise Preference program, they must first be SBE certified with Metro. In addition to meeting Metro’s SBE race and gender-neutral eligibility requirements, the firm must be:

- Headquartered in the County of Los Angeles. Headquartered means that the business

- physically conducts and manages all of its operations from a location in the County.
- The firm's headquarters must be in Los Angeles County for at least the last 6 months.

Currently, Metro has 1058 SBE certified firms in the County of Los Angeles, including a total of 354 firms certified in the City of LA that may qualify under Metro's Local Small Business Enterprise Preference Program.

Staff conducted an analysis of a representative sample of the firms that were SBE certified in the last 6 months and found that 49 of the 133 SBE firms certified were located in the County of Los Angeles. Of the 49 firms, 43 were headquartered in the County of LA. In total, 88% of the 6-month sample would meet Metro's proposed local preference certification criteria.

Metro does not recommend accepting LSBE certification from the City of Los Angeles/LAWA and the County of Los Angeles as these agencies each have local preference requirements that would affect and restrict a firm's potential to be certified under Metro's local preference program. The City of LA/LAWA requires that the firm's gross receipt for the previous year does not exceed \$5 million. The County of LA requires that firms be headquartered in the County of LA for 12 months and have annual gross receipts of \$15 million or less over the last three years whereas Metro would not have the 12-month timeframe and has a higher annual gross receipt cap of \$26.29 million over the last 5 years. Metro also does not recommend accepting the County of San Bernardino's Local Vendor certification as firms are not headquartered in Los Angeles County.

C. Review State and Federal laws and regulations and make recommendations for inclusion in future Federal and State Legislative Priorities.

The Board approved Federal and State Legislative program includes direction from the Board to seek changes to Federal and State law. Federal law (49 CFR § 661.21) currently prohibits the use of local procurement preferences on FTA-funded projects. In addition to this specific prohibition, the principle of federal preemption applies, whereby any provision of state/local law that contradicts a governing federal provision will be preempted by the federal provision when applicable. It is our understanding that any buy local procurement preference would violate broadly applicable Buy America requirements - which set forth a national preference instead of a local preference. The relevant USC provisions are 49 USC 5323(j) and 23 USC 313. Given the Board's adoption of a motion regarding Local Preference on October 21, 2021, Metro Government Relations will endeavor to change federal law to specifically allow buy local procurement provisions to be used alongside generally applicable Buy America provisions.

State law contains other provisions which limit our ability to exercise local preferences in our competitive low bid contracting. As of the writing of this report, Metro staff are coordinating to develop the specific changes, as recommended and upon Board approval, that will be needed in state law. We would seek to advance those changes in the 2022 State Legislative Session. Any changes to state law would only apply to state and/or locally funded projects after an assessment of the Pilot is complete for negotiated procurements. If Metro is successful in changing state law, the contract threshold and applicability for competitive low bid contracting could include:

Competitive Low Bid

Action Type IFB	Threshold Level	Preference (Maximum)	Preference Type	Applicable to Federally Funded Acquisition	Applicable to Non-Federally Funded (State/Local) Acquisitions
Awards under Sealed Bid for Supplies, Equipment Materials and Services, and Public Works, excluding Architecture and Engineering services	≥\$100,000	5%	Bid Discount (Bid Price Reduction)	IFB	IFB
				No	Subject to PUC (Section 130232) State Law Statute Amendment

LSBE Preference Application

- SBE Bidders that meet the LSBE criteria as a prime will receive a 5% bid discount.
- Bidders that do not meet the LSBE criteria as a prime but subcontract at least 30% of the contract value with eligible LSBE firms will receive a 5% bid discount.
- For IFBs, the preference is used to determine the bid discount for evaluation purposes but does not reduce the bid price.
- The maximum LSBE bid preference cannot exceed 5%.

Metro staff will work closely with the Board in advocating for changes to both federal and state law.

FINANCIAL IMPACT

Funding to support this program will be requested through the annual budget process.

EQUITY PLATFORM

The Transportation Business Advisory Council (TBAC), via a TBAC motion, also recommended that Metro implement a Local Small Business Preference Program to ensure that a portion of local tax dollars are allocated back to local small businesses to help grow the local economy. The proposed elements of Metro’s Local Small Business Enterprise Program were presented to TBAC at TBAC’s February 2022 meeting. According to U.S. Small Business Administration (SBA), small businesses represent 99.9% of all U.S. businesses. Small businesses not only contribute to the economic recovery of communities, but successful small businesses bring growth and innovation, and help stimulate economic growth by providing employment opportunities. Staff recommendations are to enhance equity by providing increased contracting opportunities for local regional small business-owned firms participation on Metro contracts. A framework to provide local preferences incentivizes prime contractors to utilize such firms, most of which are minority and/or women-owned, and projects

get the benefit of diverse collaboration, which contributes to the economic recovery of small businesses in the region.

Metro's Small Business Enterprise (SBE) program mirrors the Disadvantaged Business Enterprise (DBE) program, which means that all firms that qualify and are certified as a DBE are also certified as an SBE with Metro. Currently there are 2,340 Metro SBE certified firms. Of those SBE certified firms, 1,601 are also DBE certified. As a result, 68% of Metro's SBE certified firms are minority and/or women owned. These recommendations will help with the County's economic recovery by increasing the percentage of transportation dollars that remain in the region and within economically and socially disadvantaged communities.

IMPLEMENTATION OF STRATEGIC PLAN GOALS

This report supports strategic plan Goal 5.5, "Expanding opportunities for businesses and external organizations to work with Metro."

ALTERNATIVES CONSIDERED

The Board could elect to reject the Local Small Business Enterprise Program. This is not recommended as the Local Small Business Enterprise Program is a way for Metro to maximize its ability to support the local economy through contracting opportunities with regional transportation dollars.

NEXT STEPS

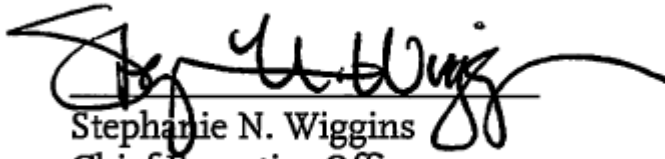
Upon Board approval, staff will proceed with finalizing the three-year Pilot LSBE program policy development, implementation, certification system changes, and solicitation updates required, with an anticipated launch in June 2022.

ATTACHMENTS

Attachment A - Motion 31 (October 21, 2021 Construction Committee Meeting)

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